83-1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. _____

WILLIAM LEN BURNS,
Petitioner

VERSUS

STATE OF GEORGIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

DON W. JOHNSON, ESQUIRE
P. O. Box 1678
Dalton, Georgia 30720

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

Petitioner was charged in Whitfield County, State of Georgia, Indictment No. 14,922 with the Offense of First Degree Arson (R.4-5). A jury trial was conducted on September 28-October 2, 1981, and Petitioner was found guilty and received a sentence of twenty (20) years, eight (8) in confinement, followed by twelve (12) on probation. (T.1-733). Petitioner appealed the conviction to the Georgia Court of Appeals which Affirmed and Petitioner's Application for Writ of Certiorari to the Supreme Court of the State of Georgia was denied on initial application and on Motion for Rehearing.

The questions presented are:

(1) Whether the state proved the essential elements of the offense so as to satisfy the requirement that any rational trier of fact could have found petitioner guilty of the offense as alleged in the indictment.

(2) Whether the Trial Court's charge on voluntary intoxication was impermissibly burden shifting.

(3) Whether the Trial Court erred in charging the jury that petitioner could be found guilty of first degree arson upon proof of criminal negligence.

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STATUTES AND TREATISES

Official Code of Georgia Annotated § § 16-1-5;
16-7-60(a)(3).

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THE STATE OF GEORGIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court in the State of Georgia denying Petitioner's Motion for Reconsideration following the denial by said Court of Petitioner's application for Writ of Certiorari to review the decision by the Georgia Court of Appeals affirming Petitioner's conviction dated May 12, 1983.

CITATION TO OPINIONS BELOW

The Opinion by the Georgia Court of Appeals is printed in Appendix A hereto. The Denial by the

Supreme Court of the State of Georgia of Petitioner's Application for Writ of Certiorari both initially and on Motion for Reconsideration was not accompanied by any Opinion by the Court.

JURISDICTION

The Supreme Court of the State of Georgia denied Petitioner's Motion for Reconsideration on his Application for Writ of Certiorari on September 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Petitioner was charged in Whitfield County, State of Georgia, Indictment No. 14,922 with the Offense of First Degree Arson (R.4-5). A jury trial was conducted on September 28-October 2, 1981, and Petitioner was found guilty and received a sentence of twenty (20) years, eight (8) in confinement, followed by twelve (12) on probation. (T.1-733). Petitioner appealed the conviction to the Georgia Court of Appeals which Affirmed and Petitioner's Application for Writ of Certiorari to the Supreme Court of the State of Georgia was denied on initial application and on Motion for Rehearing.

The questions presented are:

(1) Whether the state proved the essential elements of the offense so as to satisfy the requirement that any rational trier of fact could have found petitioner guilty of the offense as alleged in the indictment.

(2) Whether the Trial Court's charge on voluntary

intoxication was impermissibly burden shifting.

(3) Whether the Trial Court erred in charging the jury that petitioner could be found guilty of first degree arson upon proof of criminal negligence.

STATUTES INVOLVED

Official Code of Georgia Annotated (O.C.G.A.) 16-7-60(a)(3) sets forth the statutory requirements for first degree arson:

> "(a) A person commits the offense of arson in the first degree when, by means of fire or explosive, he knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage:
>
> (3) Any dwelling house, building, vehicle, railroad car, watercraft, aircraft, or other structure whether it is occupied, unoccupied, or vacant and when such is insured against loss or damage by fire or explosive and such loss or damage is accomplished without the consent of both the insurer and the insured;."

O.C.G.A., § 16-1-5 states:

"No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt."

STATEMENT OF THE CASE

Petitioner was the owner and proprietor of Dalton Florist, a florist shop located in Dalton, Whitfield County, Georgia. The building which Dalton Florist was

located in June of 1981, was damaged by fire on June 28, 1981. Petitioner was subsequently indicted, tried and convicted on a charge of First Degree Arson pursuant to *O.C.G.A.* §16-7-60(a)(3).

Petitioner's timely appeals from this conviction raising all issues set forth herein were denied by the Georgia Court of Appeals and the Georgia Supreme Court.

REASONS FOR GRANTING THE WRIT

WHETHER THE TRIAL COURT ERRED IN CHARGING THE JURY THAT PETITIONER COULD BE FOUND GUILTY OF FIRST DEGREE ARSON UPON PROOF OF CRIMINAL NEGLIGENCE

The Indictment in the present case sets forth the charge against Petitioner as first degree arson and alleges that he:

> "Without the consent of Dalton Supply Company, Inc., the insured, and without the consent of Transamerica Insurance Company, an affiliate corporation of Transamerica Insurance Group, Los Angeles, California, insurers against damage by fire, did, by means of fire *knowingly damage* a building and place of business, to-wit: Dalton Florist, located at 205 West Cuyler Street, when such structure was insured by the aforesaid insurers against damage by fire." (emphasis supplied).

(R.4-5).

The Georgia arson statute under which Petitioner was

indicted explicitly states that the offense can only be committed by one who "knowingly damages or knowingly causes, aids, abets, advises, encourages, hires, counsels, or procures another to damage" the structure involved. *O.C.G.A.* §16-7-60(a).

In its charge, the Trial Court on two occasions instructed the jury as to criminal negligence:

> "Now, a crime is a violation of a Statute of this State in which there shall be a union of joint operation of act and intention *or criminal negligence.*"

(T.716)

> "Now, criminal negligence is the reckless disregard of consequences or a heedless indifference to the rights and safety of others, and a reasonable foresight that injury would probably result and the *failure to exercise slight care.* To violate a penal statute is not criminal negligence unless the violation be dangerous in itself, or is accompanied by a recklessness which amounts to a *failure to exercise slight care,* and the violation is under such circumstances from which probably death or injury to others might reasonably be anticipated." (emphasis supplied).

(T.721-22).

The significance of the development of the intent, knowledge and mens rea requirement in criminal statutes was emphasized by Justice Jackson in *Morisette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952):

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . [C]ourts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fradulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous commonlaw crimes." (emphasis supplied).

72 S.Ct. at 243-44.

See also *Dennis v. United States*, 341 U.S. 494 71 S.Ct. 857, 862, 95 L.Ed. 1137 (1951).

In the present case, the Trial Court effectively reduced the quantum of proof required to convict and Petitioner strongly contends that the improper instruction amounts to a violation of Due Process. See i.e. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978); *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977).

WHETHER THE TRIAL COURT'S CHARGE ON VOLUNTARY INTOXICATION WAS IMPER-

MISSIBLY BURDEN SHIFTING

The Trial Court charged the jury regarding voluntary intoxication as follows:

> "Voluntary intoxication by the use of alcohol, drugs, or narcotics is no excuse for crime. The fact that one accused of a crime is under the influence of alcohol or drugs at the time of the alleged crime may be shown as illustrative of his motive in the transaction; but it can be inferred that one involuntarily under the influence of alcohol or drugs intends the legitimate consequences of his act, and the question is whether he intended to do the act or whether he intended the consequences of the act. If a person under the influence of alcohol or drugs is sufficiently intelligent to know and understand and to intend to do a certain act and to understand that certain consequences are likely to result from it and does the act, he is criminally liable for the consequences of his act."

(T.722).

Petitioner contends the Trial Court's charge impermissibly shifted the burden of persuasion to Petitioner in violation of the Fourteenth Amendment. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 29 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Of critical importance, the charge in the present case fails to articulate the *standard* under which the jury could determine "if a person under the influence of alcohol or drugs is sufficiently intelligent to know and understand and to intend to do a certain act and to understand that

certain consequences are likely to result. . ." (T.722). Absolutely no guidance was given as to whether the jury had to be convinced by some evidence, a preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt that Appellant's mental state was so affected by the influence of alcohol or drugs that his mental state constituted a legal defense. This is precisely the type of charge which this Court found constitutionally deficient in *Sandstrom v. Montana*, supra. In *Sandstrom v. Montana*, the charge in issue did not set forth a standard for the evidence required to rebut the presumption that a person intends the ordinary consequences of his voluntary acts. 99 S.Ct. at 2453, 2455. The State contended that the charge placed a burden of *production* on the defendant but did not shift the burden of *persuasion* to the accused and argued that the presumption could be rebutted by production of "some evidence." 99 S.Ct. at 2455. This Court rejected this proposition on two grounds, one of which applies in the present case:

> "(T)he jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary action (and their 'ordinary' consequences), unless *the defendant proves the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence - thus effectively shifting the burden of persuasion on the element of intent.*" (emphasis supplied).

99 S.Ct. at 2456.

The precise problem addressed in the above quotation

from *Sandstrom v. Montana* was present in the charge delivered in Petitioner's case.

WHETHER THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE OFFENSE SO AS TO SATISFY THE REQUIREMENT THAT ANY RATIONAL TRIER OF FACT COULD HAVE FOUND PETITIONER GUILTY OF THE OFFENSE AS ALLEGED IN THE INDICTMENT

As previously stated, the Indictment in the present case sets forth the charge against Petitioner as arson, first degree and stated that he performed the criminal act "without the consent of Dalton Supply Company, Inc., the insured, *and without the consent of Transamerica Insurance Company, an affiliate corporation of Transamerica Insurance Group, Los Angeles, California, insurers . . . .*"

The Georgia arson statute, *O.C.G.A.*, §16-7-60(a)(3) requires proof of absence of consent by "*both* the insurer *and* the insured."

In the present case, the representative of the insurance company called to testify as to consent testified as follows:

> "Q. As a representative of Transamerica Insurance Company, can you state *whether or not* Transamerica consented for the building at 205 W. Cuyler Street to be damaged by fire?
>
> A. *No.*" (emphasis supplied).

(T.10-11).

The witness stated that he *could not* testify and, in fact, *did not* testify that the structure was damaged by fire

without the consent of Transamerica Insurance Company (T.6-15).

Eash and every element of the crime alleged in an indictment must be proved by the State beyond a reasonable doubt in order to justify and warrant a conviction. See i.e. *Christoffel v. United States*, 338 U.S. 84, 89, 69 S.Ct. 1447, 94 L.Ed. 1826, 1831 (1949). As to the *essential elements* of an offense, the burden is *never* on the defendant to establish his innocence or to *disprove* the facts which the State *must prove* in order to establish the commission of the crime. See i.e. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Davis v. United States*, 160 U.S. 469, 487, 16 S.Ct. 353, 40 L.Ed. 449 (1895). A conviction which is not supported by proof of each element of the crime violates the constitutional requirements of Due Process and must be reversed. *Johnson v. Florida*, 391 U.S. 596, 88 S.Ct. 1713, 20 L.Ed.2d 838 (1968).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

This 21 day of November, 1983.

RESPECTFULLY SUBMITTED,

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Attorney for Petitioner

APPENDIX A

Decision of the Georgia Court of Appeals (*Burns v. The State*, Case No. 65938, dated May 12, 1983).

BIRDSONG, Judge.

First Degree Arson. William Len Burns ws convicted of first degree arson and sentenced to twenty years, eight to serve and twelve on probation. Burns brings this appeal enumerating six alleged errors. *Held:*

1. In his first enumeration of error, Burns urges that the state did not prove an essential element of the offense, i. e., that the burning was without the consent of both the building owner and his insurer. This argument is based upon the language of OCGA § 16-7-60 (a) (3) which requires that the fire damage be accomplished without the consent of both the insurer and the insured. The evidence showed unequivocally that the building owner (insured) did not consent to the burning. It is true that although the policy of insurance was admitted into evidence and an investigator for the insurer advanced the opinion that the burning was criminally intentional and not accidental, the evidence relating to the insurer's lack of consent was at best equivocal. However, we do not read the intention of the statute in the same light as does the appellant. As we read the statute, the act is not criminal (i. e., consensual) if both the insurer and the insured have agreed or acquiesced in the act. However, if either or both do not consent to the act, the burning becomes and act of arson, for the non-consenting party has been subjected to either a criminal tort or fraud. See to this

effect *State v. Hovers*, 148 Ga. App. 431 (251 SE2d 397). We find this enumeration to be withot merit.

2. Appellant complains in his second enumeration of error that the trial court lessened the burden of proof and changed the nature of the crime by charging the jury the crime of arson could be committed through an act of simple negligence. If this charge is taken out of context, we would agree that the charge establishes improper standards for the crime of arson, for that crime requires a knowing damage by fire or explosion intentionally caused. The trial court had charged the jury that a crime is committed when there is a union of act and intention or criminal negligence. In defining criminal negligence, the court informed the jury that it required a reckless disregard of consequences of heedless indifference to the rights and safty of others, a reasonable foresight that injury probably would result accompanied by a failure to exercise slight care. The mere violation of a penal statute is not necessarily criminal negligence unless the violation is accompanied by recklessness from which probable death or injury to others might reasonably be anticipated. At worst, assuming the jury's misunderstanding, the trial court simply was telling the jury by a legal truism that in appropriate circumstances, criminal negligence could be a legal substitute for an intentional act.

However, taken in context, the portion of the charge to which exception is taken could not reasonably have confused the jury. The court did not tell the jury that it could find either act and intention or act and criminal negligence, as defined, to satisfy the element of intent in the crime of arson. Its definition of

criminal negligence appeared in that portion of the charge to the jury on the subject of accident and was a supplement to and explanation of exoneration by virtue of accident, for the court had explained accident as an act not infected with criminal negligence. In its charge concerning the elements of the crime charged, the court required the jury to find the act was intentional, knowing and wilful. At no point in this portion of its charge did the court refer to criminal negligence. Moreover, the evidence did not give rise to such an implication or inference. The state sought to prove a deliberate and knowing act and sought to rule out any negligent or unintentional act. Burns himself asserted the defense of alibi. Under these circumstances, we are fully satisfied that even if the charge, taken out of context, was erroneous, nevertheless, in the context of the evidence and the whole charge, it was highly improbable that the error in any way contributed to the verdict of guilty. *Johnson v. State*, 238 Ga. 59, 61 (230 SE2d 869). We find no prejudice to Burns, even assuming the charge to be inappropriate.

3. By his third enumeration, Burns assers the insufficiency of the evidence to support the conviction. Though the evidence was largely circumstantial in nature, there was convincing evidence from impartial bystanders that they saw the beginnings of smoke rising from the roof of Burns' flower shop. The bystanders rushed across the street as the smoke rapidly began to increase in intensity. Just as they arrived out the front door, sweaty and disheveled, with soot upon his body and clothes, and a cut upon his head. In answer to an inquiry if anyone else was in the establishment, Burns

replied in the negative. When Burns was informed that one of the bystanders was calling the fire to the attention of appropriate authorities, Burns jumped in his van and drove away. Shortly thereafter, Burns called the fire department to report that he had just returned from Chattanooga and that he had found his place of business on fire. Subsequently, Burns denied being at his flower shop at the time he was seen running from the building. Lastly, there was convincing evidence that the fire was started on or near the floor of the flower shop with the use of an accelerant and, in the opinion of the investigators, the fire was deliberately set. Opposed to this testimony was other competent evidence offered by the defense that the fire was the result of an electrical shortage and started in the roof of the shop and not on the floor as contended by the state.

We will not speculate as to what evidence the jury chose to believe or disbelieve. On appeal this court is bound to construe the evidence with every inference and presumption being in favor of upholding the jury's verdict. *Wren v. State*, 57 Ga. App. 641, 644 (196 SE 146). Where the testimony of the state and that of the accused is in conflict, the jury is the final arbiter (*Sims v. State*, 137 Ga. App. 264 (223 SE2d 468): *Crews v. State*, 133 Ga. App. 764 (213 SE2d 34)), and after the verdict is approved by the trial court, the evidence must be construed so as to uphold the verdict even where there are discrepancies. *Boatright v. Rich's*, 121 Ga. App. 121 (173 SE2d 232). To set aside the convention, it is not sufficient that the circumstantial evidence show that the act might by bare possibility have been done by somebody else. *Hunter v. State*, 91 Ga. App. 136, 138

(85 SE2d 90). It must exclude every reasonable hypothesis save the guilt of the accused, which is primarily a question for determination for the jury. *Workman v. State*, 137 Ga. App. 746 (1) (224 SE2d 757). An appellate court has no yardstick to determine what in a given case is a reasonable hypothesis except to rely on the informed and weighed conclusions of twelve intelligent jurors. The jurors in this case heard the witness, and are better qualified to judge the reasonableness of a hypothesis raised by evidence (or its lack) than is this court which is restricted to a cold record and to issues of law. *Estep v. State*, 154 Ga. App. 1 (267 SE2d 314). On the basis of the evidence presented to the trier of fact, we are satisfied that such trier of fact could be satisfied beyond reasonable doubt by legal and competent evidence that appellant's guilt was fully established. *Baldwin v. State*, 153 Ga. App. 35, 37 (264 SE2d 528). This enumeration is without merit.

4. Appellant complains in his fourth enumeration of error that the trial court erroneously shifted the burden of proof to the accused in the charge on voluntary intoxication. This charge, in almost identical verbiage, was considered in *Krier v. State*, 249 Ga. 80, 86 (6) (287 SE2d 531) upon the same complaint and found not to be burden shifting. *Krier*, supra, is dispositive of this enumeration.

5. Appellant urges his character improperly was placed in issue by a question asked his mother on cross examination wherein she was asked if a fire had ever occurred in her home (her son being a resident therein). A prompt objection was made to the question, the objection was sustained, no answer was given and the

jury charged to eliminate from their minds the question or any possible inferences therefrom when deliberating on the issues of the case. Appellant now complains the trial court erred in denying his motion for mistrial. We find no error.

The trial court has broad discretion in passing on a motion for mistrial, and its ruling will not be disturbed by the appellate courts unless it appears that there has been a manifest abuse of discretion and that a new trial is essential to the preservation of the right to a fair trial. *Gasaway v. State*, 137 Ga. App. 653, 657 (224 SE2d 772). When an objection made to a question made by counsel is sustained, and instructions to disregard the question and its implications are given, a ruling for mistrial is not demanded. *Lenear v. State*, 239 Ga. 617, 619 (12, 13) (238 SE2d 407). Lastly, it generally is held that no harmful error occurs where no answer is given to an improper question. *Pope v. Firestone Tire &c. Co.*, 150 Ga. App. 396 (258 SE2d 14). We find no merit in this enumeration.

6. In his final enumeration of error, Burns contends that the trial court erred in allowing a video film showing the potential for ignition of flammable material by a short circuiting cable as well as the effect of external heat upon an energized cable. Although the film was of tests that were wholly unrelated to the fire in question, one of the major issues in the case was whether the inception of the fire was the result of ignition of flammable material by a faulty entrance cable or whether the physical evidence indicated a starting point of the fire in the attic or at the floor. The video film, while not dispositive of these questions, clearly was

relevant to clarify the issues to the jury.

Questions of the relevancy of evidence are for the court. *Hotchkiss v. Newton,* 10 Ga. 560. When facts are such that the jury, if permitted to hear them, may or may not make an inference pertinent to the issue, according to the view which they may take of them in connection with the other facts in evidence, they are such that the jury ought to be permitted to hear them. *Walker v. Roberts,* 20 Ga. 15 (1); *Brown v. Wilson,* 55 Ga. App. 262 (1) (189 SE 860). That the testimony objected to falls short of proving the fact sought to be established is not in itself sufficient reason for excluding it provided that it, alone or in connection with other testimony, tends to prove the matter in issue. *Livingston v. Barnett,* 193 Ga. 640 (3a) (19 SE2d 385). Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. *Harris v. State,* 142 Ga. App. 37, 41 (7) (234 SE2d 798). Furthermore, it is within the sound discretion of the trial court to permit or refuse a demonstration. Under the facts of this case, we find no abuse of discretion. *Redwing Carriers v. Knight,* 143 Ga. App. 668, 671 (5) (239 SE2d 686).

Judgment affirmed. Shulman, C. J., and McMurray, P. J., concur.

APPENDIX A-1

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Sept. 6, 1983

Case No. 40068. BURNS V. THE STATE

The Supreme Court today denied the writ of certiorari in this case. 9µ

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX A-2

Clerk's Office, Supreme Court of Georgia

ATLANTA 9/22/83

The motion for a ~~rehearing~~ reconsideration was denied today:

Case No. 40068, Burns v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk